



## The City of San Diego

### Staff Report

DATE ISSUED: 9/2/2021

TO: City Council

FROM: Office of the City Attorney

SUBJECT: First Amendment to Agreement with Schwartz Semerdjian Cauley & Evans LLP to Provide Continued Legal Services as Panel Outside Counsel

Primary Contact: Jim McNeill Phone: (619) 533-5860

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Council District(s): City Wide

#### OVERVIEW:

The City of San Diego (City) currently has an as-needed agreement with the law firm of Schwartz Semerdjian Cauley & Evans LLP (Law Firm) as one of the City's retained panel counsel to provide legal services in "Business and Financial Affairs."

The City Attorney's Office (CAO) seeks approval of a First Amendment to this legal services agreement (LSA) with the Law Firm to increase the total not-to-exceed amount to \$750,000 from \$250,000. The \$500,000 increase is necessary to continue work the Law Firm is performing on behalf of the City, which primarily consists of representing the City in lawsuits related to the City's lease acquisition of the 101 Ash Street and Civic Center Plaza (CCP) properties, as well as to perform additional as-needed work in representing the City during the remaining years of the contract. The lawsuits involving the 101 Ash Street and CCP lease transactions are as follows:

1. Gordon Lawsuit: This lawsuit is being brought by a taxpayer against the City as well as the current owner and lessor of the 101 Ash Street building, the lender, and the "volunteer" broker involved in this transaction. This action alleges violations of the State Constitutional debt limitation and seeks rescission of the City's lease to purchase contract for the 101 Ash Street property on grounds that the City is illegally expending and wasting public funds because the City is not receiving the benefit of the property purchase as the City cannot occupy the building.
2. 101 Ash Street Lawsuit: This lawsuit is being brought by the City against the current owner and lessor of the 101 Ash Street building, the lender, and the "volunteer" broker involved in this transaction. The contractors who performed work on the property also are named as defendants in this action. In addition to the City's assertion of violations of the State Constitutional debt limitation, this action also seeks declaratory relief for the court to determine that the City has the right to not pay rent because the City is not able to occupy the building. The City recently amended its complaint to add violations of breach of fiduciary duty, fraud and concealment, and intentional misrepresentation relating to the transaction and seeks to void the lease agreement under Government Code Section 1090.
3. CCP Lawsuit: This lawsuit is being brought by the City against the current owner and lessor of the CCP building, the lender, and the "volunteer" broker involved in this transaction. This is a

recent lawsuit filed by the City because of new discoveries related to breach of fiduciary duty, fraud and concealment, and intentional misrepresentation relating to the transaction to purchase the CCP building and seeks to void the lease agreement under Government Code Section 1090.

The Law Firm has already handled the following matters on behalf of the City that are now completed, including the following:

1. Providing an independent legal review of various legal issues affecting the City's water and sewer ratepayers in the sale transaction of the Mission Valley stadium site (Stadium) to San Diego State University (SDSU); and,
2. Providing the Office of the City Auditor with legal advice, which was requested by that office on a number of questions related to the appropriate distribution of confidential fraud hotline reports.

City Council approval of the First Amendment is required pursuant to San Diego Municipal Code section 22.3207(a)(2) because the First Amendment will cause the City's total expenditure toward the Law Firm's services to exceed \$250,000, the maximum amount allowed under the City Council's prior approval of the retention of the Law Firm. (See Resolution No. R-311866, adopted effective July 20, 2018.)

PROPOSED ACTIONS:

1. Approve and authorize the Mayor or his designee to execute the First Amendment to the legal services agreement with the Law Firm, to increase the total not-to-exceed amount to \$750,000 from \$250,000.
2. Authorize the Chief Financial Officer or his designee to expend an amount not to exceed \$750,000 for the purpose of funding the First Amendment to the legal services agreement with the Law Firm, contingent upon the adoption of the Annual Appropriation Ordinance for the applicable fiscal year and the Chief Financial Officer furnishing one or more certificates certifying that funds necessary for expenditure are, or will be, on deposit with the City Treasurer.

## DISCUSSION OF ITEM:

### A. Status of Legal Services Agreement and Current Engagement

On July 20, 2018, the City Council approved the retention of the Law Firm as one of a panel of law firms that would act as outside counsel for the City on an as-needed basis. The Law Firm was awarded a five-year LSA with a not-to-exceed amount of \$250,000 as a result of a competitive procurement which involved the City issuing two Requests for Proposal (RFP) for seven areas of law.

No funding is requested as part of this action, as funding will come from the budgets of various City departments. The LSA was funded with monies appropriated as follows: \$215,000 from the Public Liability Fund to fund the Law Firm's representation of the City on lawsuits related to 101 Ash Street transaction, \$18,339 from the City's Water Utility Fund to fund the work performed in relation to reviewing issues affecting the City's water and sewer ratepayers as part of the sale of the Stadium to SDSU, and \$15,457 from the budget of the Office of the City Auditor to provide legal advice to the City Auditor on issues relating to the distribution of confidential fraud hotline reports.

The Law Firm is both defending the City in the Gordon Lawsuit and representing the City as plaintiff and cross-defendant in the 101 Ash Street Lawsuit and plaintiff in the CCP Lawsuit.<sup>1</sup> All of these lawsuits stem from the City's lease to purchase of two downtown commercial high-rise buildings located at 101 Ash Street and 1200 Third Avenue (CCP). The owners, parties, and "volunteer" broker involved in these transactions were 101 Ash Street LLC, 1200 CCP, LLC, Cisterra, and Jason Hughes with the commercial real estate firm of Hughes Marino. Throughout the transactions on both properties, Mr. Hughes represented that he acted in a volunteer and civic capacity in advising the City on both transactions.

On August 17, 2020, an individual taxpayer named John Gordon sued the City, as well as the landlord and former owner of the 101 Ash Street building seeking to invalidate the lease agreement for the property. The lawsuit was initially brought on the grounds that the non-City defendants engaged in fraudulent and negligent misrepresentation in the transaction and that the City is illegally expending and wasting public funds because the City is unable to occupy the building. It was amended to only assert violations of the State Constitutional debt limitation and seeks rescission of the City's lease to purchase contract for the 101 Ash Street property on grounds that the City is illegally expending and wasting public funds because the City is not receiving the benefit of the property purchase as the City cannot occupy the building.

As to the Gordon Lawsuit, the Law Firm has pursued efforts to dismiss the case through various motions that have been filed, but the court has not dismissed the lawsuit. As a result, the City will have to further defend this matter.

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<sup>1</sup> The Law Firm also recently defended the City in a separate unlawful detainer action brought by the lender on July 28, 2021, seeking to evict the City from the CCP property as a result of the City's decision to cease making lease payments after the discovery of conflicts of interest related to the CCP transaction. However, on September 1, 2021, the lender filed a request to dismiss the unlawful detainer action without prejudice.

On October 9, 2020, the City filed the 101 Ash Street Lawsuit against the owner and lessor of the 101 Ash Street building, 101 Ash LLC, and the lender, Wilmington Trust. In addition to the City's assertion of violations of the State Constitutional debt limitation, this action sought declaratory relief for the court to determine that the City has the right to not pay rent because the City is not able to occupy the building.

On June 28, 2021, during the course of the litigation on the 101 Ash Street Lawsuit, the City discovered through the issuance of subpoenas that the City's "volunteer" broker on the 101 Ash Street property transaction, Mr. Hughes, had received compensation of about \$4.4 million for the transaction. The City also learned at that time that Mr. Hughes received about \$5.1 million for the City's lease to purchase of the CCP building. The 101 Ash Street lawsuit was amended on June 29, 2021, to add violations of breach of fiduciary duty, fraud and concealment, and intentional misrepresentation relating to the transaction. The City also added as parties Cisterra, the "volunteer" broker Jason Hughes, and contractors who performed work on the property. In addition, the City filed a separate lawsuit alleging breach of fiduciary duty, fraud and concealment, and intentional misrepresentation relating to the CCP transaction, which seeks to void the CCP building lease agreement under Government Code Section 1090.

#### B. Requested Contract Increase and Related Justification.

This increase in the contract amount will allow the Law Firm to continue representing the City on the existing litigation involving the 101 Ash Street and CCP transactions and to possibly take on additional work on an as-needed basis during the remainder of the five-year contract term. The contract amount increase is necessary and prudent for various reasons, including:

- Timeliness: Without this contract amendment, the Law Firm will not be able to continue to represent the City on the lawsuits involving the 101 Ash Street and CCP transactions. There is a trial date set for January 2023 in the 101 Ash Street Lawsuit and Gordon Lawsuit. Although there has been no trial date yet set for the CCP Lawsuit because it has just been recently filed, there is much work that needs to be done on all three cases and it is very likely that one or more of these case will proceed to trial.
- Experience and Expertise of the Law Firm: The Law Firm has considerable expertise in a wide variety of areas, including Government Code 1090, business litigation, construction litigation, and commercial real estate litigation, which are all relevant to the litigation on the 101 Ash Street and CCP transactions. The Law Firm has represented a number of public and quasi-public agencies in these areas such as the County of Imperial, Sweetwater Union High School District, and various Water Districts.
- Workload Capacity: The CAO does not have the capacity to handle these three high-profile, complex litigation matters involving the 101 Ash Street and CCP transactions. This is due in part to the recent departure of two extremely experienced senior litigators and medical/maternity leave of other litigators.
- Continuity of Services: If the contract amount increase is not approved, the Law Firm will need to discontinue its services soon due to the fact that the contract limit under the original agreement will soon be reached.

Given that there is much at stake with the litigation of these extremely complex and time-consuming matters, the CAO is in the process of obtaining proposals to qualify an additional law firm that can work together with the Schwartz Semerdjian Law Firm to further support the City's efforts on these litigation matters. It is not uncommon on litigation of this magnitude to have multiple firms working together to pursue the matters. Since the process of identifying another qualified law firm will take some time, it is critical that the Schwartz Semerdjian Law Firm have the funding needed to continue to vigorously litigate these matters. When the CAO has completed the process of identifying the additional law firm having expertise on these matters, the CAO will bring the matter forward for Council consideration and approval.

City Strategic Plan Goal(s)/Objective(s): N/A

Fiscal Considerations:

The proposed First Amendment to the LSA is in an amount not to exceed \$750,000 and legal services to be provided will be from funding sources already appropriated by the City Council such as the budget of the City Auditor's Office, Water Utility Fund, and the Public Liability Fund. No funding is requested as part of this action, as funding will come from the budgets of various City departments.

Charter Section 225 Disclosure of Business Interests:

The following individuals (not LLCs) own more than 10% of an entity contracting with the City or will receive more than 10% of the contracted amount:

Ross J. Schwartz (Poway, California)  
Dick A. Semerdjian (San Diego, California)  
Kevin T. Cauley (San Diego, California)

Environmental Impact:

The proposed First Amendment to the LSA is not a project as defined by the California Environmental Quality Act (CEQA) Section 21065 and CEQA Guidelines Section 15378(b)(5), as it is an organizational or administrative activity of government that will not result in direct or indirect physical changes in the environment. The determination that this activity is not subject to CEQA pursuant to section 15060(c)(3) is not appealable, and a Notice of Right to appeal the Environmental Determination is not required.

Equal Opportunity Contracting Information (if applicable):

This agreement is subject to the City's Equal Employment Opportunity Outreach Program (San Diego Ordinance No. 18173, Municipal Code Sections 22.2701 through 22.2708) and Non-Discrimination in Contracting Ordinance (San Diego Municipal Code Sections 22.3501 through 22.3517).

Previous Council and/or Committee Actions:

On July 20, 2018, the Council approved the retention of the Law Firm to provide as-needed legal services.

Key Stakeholders and Community Outreach Efforts: N/A

Jim McNeill  
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Assistant City Attorney